ARTICLE: PROFILING THE PROFILERS: A STUDY OF THE TRIAL CONSULTING PROFESSION, ITS IMPACT ON TRIAL JUSTICE AND WHAT, IF ANYTHING, TO DO ABOUT IT *

* Although this Article critiques and compliments the trial consulting industry in its current form, it is a commentary on the process of trial consulting and is not intended as a commentary on the individuals or the motivations of individuals who offer trial consulting services.

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LEXISNEXIS SUMMARY:
... A dramatic example is the "poison pill" strategy trial consultant Amy Singer employed to elicit a mistrial in the infamous Miami River Cops case in 1987. ... If trial consulting is indeed sufficiently effective to skew trial outcomes, this seriously implicates the fairness of jury trials, especially when only one side can afford and uses a trial consultant. ... The trial consulting industry is completely unregulated; anyone can hold themselves out and practice as a trial consultant. ... In so doing, they hone the skills of the trial consultant. ... Although scientific jury selection remains a mainstay of the trial consultant's services, today's consultants offer many of the additional post-selection services alluded to earlier. ... In a recent study, investigators tested how the use of a psychologist trial consultant for jury selection and trial preparation impacted the perceived fairness of trial procedures and outcomes. ... Eliminating the
attorney's ability to use the trial consultant's advice in strategically picking the composition of the jury would undercut scientific jury selection. ... A trial consultant is likely to state for the record that his or her jury selection suggestions are to eliminate biased prospective jurors in the service of constituting an impartial jury, and to recommend evidence and strategies that make the evidence clearer to the jurors, that is, to enhance the exercise of juror rationality. ...

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I. Introduction

Fortune smiles beneficently upon the trial consulting industry. How many professions can you name whose practitioners' services are decidedly pricey, yet no warranty is given or expected, and where the services provided presumably affect trial outcomes, yet the practitioners are wholly unregulated? So it is with trial consultants.

Trial consulting has become de rigueur in major litigation. The notoriety of some of the cases is arguably exceeded only by their unpopularity. n1 So common is consulting in large jury trials that one [*443] Boston trial lawyer opined, "no self-respecting trial lawyer will go through the process of jury selection in an important case without the assistance of highly paid trial consultants." n2 The importance of consultants is highlighted by the conclusion of some jury researchers that a "case may be won or lost at the [jury selection stage]." n3 A New York attorney adds: "It's gotten to the point where if the case is large enough, it's almost malpractice not to use [trial consultants]." n4 Consulting has even become the stuff of popular literature, both fictional n5 and nonfictional. n6

Although trial consulting services have expanded considerably beyond the jury selection phase of the trial, scientific jury selection remains a lightning rod for controversy. Fueling the debate is an abiding sense, shared by many, of two dynamics regarding jury trials. The first is that the composition of the jury has a disproportionate impact on trial outcome. The second is that trial consultants can and do unfairly skew jury compositions. n7

[*444] Notwithstanding computer-assisted analyses of empirical tests based on established behavioral science principles, trial consulting remains an art as well as a science. n8 The consultant's training, experience, skill and judgment are key complements to data generation and analysis in formulating successful trial strategy. A dramatic example is the "poison pill" strategy trial consultant Amy Singer employed to elicit a mistrial in the infamous Miami River Cops case in 1987. She "deliberately picked jurors 'who would explode, who would hate each other. That's what you want to do in a criminal case when it is obvious that people are guilty. You go for personalities.' Then, 'you hope the personalities will combust.'" n9

Scientific jury selection began in 1971 with the successful defense of the "Harrisburg Seven," n10 a group of Vietnam War protesters accused of, among other things, conspiring to destroy selective service records and kidnap Henry Kissinger. Federal prosecutors selected Harrisburg, Pennsylvania, as the trial site because it was a politically conservative area. The defense counsel recruited a team of social scientists, headed by Columbia University sociologist Jay Schulman, who surveyed over 1000 Harrisburg residents, and then made follow-up interviews. Based on the results and aided by computer analysis, the defense fashioned demographic profiles of individuals most likely to be sympathetic or unsympathetic to the defendants. Armed with this data, the defense selected its jury. Despite the investment of considerable time and money by the prosecution commensurate with the attention given the trial by the media - the government spent about two million dollars on the case - it ended with a hung jury. n11

Since the "Harrisburg Seven" trial, trial consulting has, according to some estimates, mushroomed "into a $ 400 million-a-year industry" n12 [*445] with over 700 practitioners n13 and over 400 firms. n14 Trial consultants are typically psychologists. Many have doctoral degrees. Attorneys, sociologists, and individuals with varying degrees of experience in communications and marketing constitute the bulk of the remainder. n15 The tic to marketing is not coincidental, for trial consulting is very much the use of modern psychological assessment techniques packaged and applied in a marketing-type process. In essence, the trial consultant performs a marketing function in two basic ways.
First, a target audience is identified, that is, those who will be most receptive to the client's case, in much the same way marketing experts would test public receptivity to new consumer products. Then, a strategy is devised to help persuade the jury qua customers to "buy" the client's product by emphasizing those case-specific factors having the most appeal to the particular individuals on the jury. While all of this transpires within the context of a legal process - pretrial and trial activities - a marketing perspective decidedly informs the consultant's perspective. "Like it or not," write Bennett and Hirschhorn, the authors of one of the more popular texts on trial consulting, "you are selling a product, and it is important to know what real people, in this instance the jury, think of your goods and your sales pitch." n16

By training and experience, the attorney focuses on the relevant law and evidentiary facts of the case. By contrast, the trial consultant seeks a far broader scope of potentially influential factors, such as the appearance and speaking style of the client and other possible witnesses. Moreover, these nonlegal or extralegal factors vary directly with the perceived preferences and biases of the jury. If, for example, the entire jury in the trial were replaced, the trial consultant's proposals and strategy for the new jury might differ unrecognizably from that proposed for the original jury, whereas the attorney's evidence and arguments might very well stay the same or vary only minimally.

New developments attend the progression of trial consulting. In what may presage the profession's future, trial consulting has gone online. [*446] Cyberjury is a free Web site listing trial consultants. n17 Another online consulting service is Sci-Jur, a non-profit organization operated by the Law and Psychology program at the University of Nebraska. New technological applications for trial consulting surface regularly. They include real-time measuring devices that allow mock jurors to register their reactions to lawyers' presentations instantaneously, either voluntarily with keypads or involuntarily with biofeedback mechanisms attached to their bodies. n18 A recent innovation provides consultants an historical database of the past reactions of actual and surrogate jurors in similar cases in that jurisdiction. n19 A fast-growing subspecialization is simulated reenactments and other visual presentations.

One inescapable irony marks the evolution of trial consulting. Its first beneficiaries were indigent criminal defendants tried in the crucible of the anti-war protest and other political movements of the 1970s. Protest sympathizers such as Schulman assembled teams to counteract the overwhelming advantage of the state against poor political dissidents. By contrast, today's typical clients are the wealthy and privileged: corporations and well-heeled, prominent individuals, some celebrities, engaged in civil litigation. n20

As trial consulting proliferates, several major issues regarding its use resonate. One bone of contention is the actual efficacy of trial consulting techniques. A second major issue is the fairness of trial consulting. A third concern in trial consulting implicates professional ethics and standards. Each issue is at once discrete and potentially consequential to the others. The efficacy of trial consulting, for example, bears upon its fairness to the litigants; whereas professional standards, if imposed, may well mitigate the efficacy of consulting. Collectively, these issues have spurred demands for reform.

But before embarking headlong on remedial actions that, however well-intended, prove ill- advised, more research and critical thinking about the profession are in order. Many people conceive the role of trial consultants as providing profiles of the ideal jury. Yet despite its growth, and the anecdotal attention given it, no one has profiled the profession. To this end, all 377 consultants listed in the American Society of Trial Consultants (ASTC) Membership Directory, 1996-1997 edition, were invited by the authors to participate in a national survey of trial consultants. n21 The survey questionnaire sought information in three areas. In the first area, questions about the consultant's practice supplemented demographic and personal background questions. The second area focused on trial consulting services. For each of thirteen commonly provided services (plus an "other" option), respondents were asked to rate the frequency with which they offer the service, the percentage of time spent on it and its perceived efficacy. Consultants also evaluated the relative efficacy of services by category. n22 The last area posed questions on professional standards and ethics, including the key question of whether trial consultants should be licensed.

Part II of this Article profiles the trial consulting profession. It briefly sketches the tools and services consultants use, n23 and presents the key findings of the survey with respect to the consultants' actual practices and services
offered. Part III examines the first of the three major issues, efficacy. Trial consulting resists a definitive empirical assessment of its efficacy, but several inferences about the superior efficacy of jury science relative to traditional methods can be drawn. This Part also presents the survey findings with regard to the efficacy of trial consulting services - both by individual service and by service category - and considers the survey’s findings regarding the relationship between the efficacy of the services, the frequency with which they are provided and the percentage of time practitioners spend on them. Part IV considers the issue of fairness. If trial consulting is indeed sufficiently effective to skew trial outcomes, this seriously implicates the fairness of jury trials, especially when only one side can afford and uses a trial consultant. Even if trial consulting’s efficacy is inconclusive, a badly besmirched popular perception may undermine public support for jury trials using [*448] consultants. Part V explores the third issue, professional standards. The trial consulting industry is completely unregulated; anyone can hold themselves out and practice as a trial consultant. There are no state licensing requirements, nor is there any binding or meaningful code of professional ethics. Finally, Part VI addresses responses to the issues. Several proposed reforms and their potential ramifications are discussed, along with related survey findings.

II. A Profile of the Profession

A. Consultants: Who Are They?

The mean age of responding consultants was 45.3 years (s = 10.1), and their ages ranged from 18 to 74 years. The lowest age reflects the absence of minimum experience or academic credentials required to self-identify as a trial consultant. With regard to educational background, over half of the respondents had a Ph.D., some having both a Ph.D. and J.D. The results are indicated in Table 1.

[SEE TABLE IN ORIGINAL]

Psychology was the most common area of study for those with an advanced degree: 57% of respondents indicated that their highest degree was in psychology, either alone or a combination with another academic area. A degree in communications was the second most popular degree for consultants, followed by law. Respondents also specified the academic specialization of the highest degree they obtained past high school. Table 2 reports these specializations.

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[SEE TABLE IN ORIGINAL]

The mean number of years of experience as a trial consultant was 9.6 years (s = 7.28). About one-third had prior professional experiences lasting five or more years in a field other than psychology or law (see Table 3). This datum suggests that trial consulting has become a second career for a large portion of consultants with little or no formal background in the two traditional disciplines underlying consulting. n24

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B. Their Practices and Tools

1. their practices

Consultants were slightly less likely to work as sole practitioners as they were to work as part of a team. n25 Sole practitioners did not report having significantly more years of experience as consultants n26 or a typical hourly fee that differed significantly from those of consultants who do not work alone. n27 Male and female consultants report comparable typical hourly rates, years of experience and the same proportion of sole to non-sole practitioner work statuses. n28
Civil defendants and plaintiffs are the most common clients. Respondents indicated that civil defendants comprised, on average, more than half of their practice. When civil clients (both plaintiffs and defendants) are contrasted with criminal clients (both prosecution and defense), the mean percentage of practice that consultants spend on civil clients is 84.12%, whereas the average for criminal clients is only 13.69%. Respondents were asked to estimate the percentage of their typical client base by type of client: plaintiff, civil defendant, criminal prosecution, criminal defendant and other. Table 4 indicates the means and standard deviations for each estimated percentage of client base by client-type, as well as the percentage of respondents with this type of client.

[SEE TABLE IN ORIGINAL]

2. tools of the trade

Trial consultants employ a variety of techniques. Their tool bags include what has come to be referred to as "jury science." The most common tools are described in numerous books, articles, and trade publications. n29

Trial consulting services are divisible into four discrete categories, each corresponding to activities performed during a particular phase of the trial. The first category is pretrial research. During this period the consultant tries to get a sense of the prevalent values and views of the community from which the jury will be selected. The commonly used tools to accomplish this objective are community attitude surveys, focus groups, and mock trial simulations. n30 n31 n32

Consultants postulate that pretrial jury research and simulations have been successfully used in a wide range of cases, in both federal and state courts. n33 Leading practitioners of jury science boast they can predict trial outcomes before the evidence is heard with over ninety-percent certitude. n34 Myriad books join even more numerous articles on how to select a winning jury through the application of psychological techniques. The latter populate practitioner-oriented journals such as Trial, Litigation, the Journal of Trial Diplomacy, and the National Law Journal.

The second category is jury selection. This is the area of activities popularly associated with trial consulting. Investigation of prospective and actual jurors, the formulation and posing of voir dire questions, change of venue studies, and other jury selection strategies constitute the services conducted during the jury selection phase of the trial. Trial consultants also provide attorneys with observations of the jury panelists' courtroom demeanor during the entire jury selection process. The evaluations apply psychological theory to the observed verbal and non-verbal courtroom communications of panelists. For example, the panelist who sits rigidly and responds in a laconic tone with monosyllabic answers during voir dire suggests an "authoritarian" personality likely to side with the prosecution in a criminal case. n39

Trial consulting does not end with jury selection. Trial consultants perform the third category of services - courtroom presentation and strategy - after the jury has been selected. Although trial consultants each have their own specialty, their advertising often includes the entire array of trial consulting services - perhaps to invite one-stop shopping. Common post-selection services are assistance with opening and closing arguments, witness preparation, courtroom observation, shadow juries, developing case theory and presentation, and demonstrative evidence. Collectively, these services seek to inform courtroom strategy and enhance the attorney's courtroom presentation. Of course few clients would need or could afford to avail themselves of all of these offerings. Trial consultants employ several other tools to inform post-selection trial strategy. One that spans jury selection and post-selection strategy is group dynamics analysis. Whereas attorneys will tend to perceive the jury as twelve individuals, the trial consultant will conceptualize it as two or more subgroups with their own leaders and followers. That is because group dynamics may swing jury deliberations in unpredictable ways. n40 Hence, in considering their suggestions for peremptory challenges, consultants often project with which group each prospective juror will ally. Group dynamics analysis was one of the jury science techniques used by Schulman in the Harrisburg Seven trial.
The final category is post-trial services, most notably post-trial juror interviews. Although these interviews come too late to affect the specific trial to which they relate, they provide valuable feedback to the consultants as to hypothesis-testing and validation or rejection of trial tactics and strategy. In so doing, they hone the skills of the trial consultant. Another activity falling in this category, continuing legal education instruction, serves the litigation bar, which is the source of virtually all of the trial consultants' direct clientele.

3. Consulting services: what is provided, how often, and in what proportion?

Respondents were given a list of common consulting services (listed below) and were asked to indicate the relative frequency with which they provide each service. They also estimated the percentage of their own consulting time in a typical month spent providing each service. Consultants report providing case theory/presentation services more often than any other type of service, followed by voir dire questions/strategy services and witness-preparation services, respectively. They report providing shadow jury services the least frequently, followed by change of venue studies and community attitude surveys, respectively.

[456] Consultants report spending the greatest percentage of their consulting time on mock trial simulations, followed by case theory/presentation and focus groups, respectively. They spend the smallest percentage of their actual professional hours on shadow juries, followed by post-trial juror interviews. There was a "tie" for third lowest ranking in terms of percentage of time: community attitude surveys and change of venue studies. Table 5 shows, by type of consulting service, the means (and standard deviations) of each frequency and percentage of time spent working. The means are listed in descending order according to mean relative frequency.

[SEE TABLE IN ORIGINAL]

Analyzing services provided by category, there was no significant difference in terms of relative frequency across the three major categories. The same analysis of percentage of work time spent on these service categories revealed a significantly higher mean percentage of time spent on pretrial research than on courtroom presentation/strategy services, but no significant difference between pretrial research and jury selection or between courtroom presentation/strategy and jury selection. n41 Table 6 lists the services included in each service category as well as the means for relative frequencies and percentages of time spent on each service category. The fact that consultants tended to spend a greater percentage of time on pretrial research but did not offer it more frequently suggests that pretrial research services, as a whole, are more time-consuming than are services in the jury selection and courtroom presentation/strategy categories.

[SEE TABLE IN ORIGINAL][458]

III. Efficacy

Great interest and controversy exist among social scientists and attorneys as to the true efficacy of trial consulting. n42 Various perspectives are possible. First, we can review the empirical testing done to date - both the findings and what inferences can be elicited from them. Second, the accelerating popularity and use of trial consulting services must be noted and accorded due weight. Unlike most academic researchers who comment on the value of consulting services, actual users of the services make decisions and act in the real world, and consequently, may be better able to assess their true value. Third, inferences can be drawn as to the efficacy of trial consulting services by comparing trial consulting methods with the traditional strategies used by attorneys. Lastly, we can evaluate the assessments of trial consultants themselves as to the most effective services and service categories.

A. Empirical Tests

Although much of the focus of trial consulting is shifting away from jury selection to services that assist with the presentation of evidence, n43 empirical studies of the efficacy of trial consulting per se n44 - primarily in mock trials
- have been limited almost exclusively to the predictive effect of scientific jury selection. Unfortunately, there have been no empirical evaluations of the combined use of the newer trial consulting techniques (e.g., animated simulations) with the more traditional methods of scientific jury selection, such as community surveys. n45 The absence of such data has led one scholar to conclude: "Academic researchers have, based on early reviews of a small and methodologically unsophisticated body of literature, thrown out the baby with the bathwater." n46 Most empirical studies of scientific jury selection indicate that attempts to link demographic and personality variables directly to verdicts are only modestly successful, with the variance accounted for by verdict preferences generally ranging from five to fifteen percent in different case types and looking at divergent sets of background characteristic measures. n47 While an explained variance of five to fifteen percent appears low at first blush, an illustration provided by Fulero and Penrod suggests otherwise. With a jury pool one-half favorable and one-half unfavorable, an attorney acting on a completely random basis would correctly classify one-half of the jurors. If, however, a survey reliably found a five percent variance in verdicts attributable to attitudinal and personality measures, successful use of that data would raise the attorney's performance to sixty-one percent correct classification of the jurors. With a fifteen percent variance, performance would increase to sixty-nine percent. n48

Nevertheless, the overall cast of these assessments is decidedly pessimistic. After reviewing the research, for example, MacCoun observed: "[A] large body of systematic empirical research has called into question the efficacy of both traditional and scientific jury selection strategies. In general, the demographic characteristics, personality traits, and general attitudes of jurors have weak and unreliable effects on verdicts." n49 Diamond's review of the research echoes this evaluation: "There is good reason to be skeptical about the potential of [scientific jury selection] to improve selection decisions substantially." n50 Many of the same detractors of scientific jury selection, however, cite questionable and inconsistent methodologies in the surveys upon which they rely. Several criticisms about methodology focus on doubts about the external validity of simulations, n51 over-reliance on college students rather than actual jurors as subjects, n52 failure of the stimulus materials to approximate actual trials, n53 and failure to include group deliberations n54 in the procedure - most studies ask only for individual written decisions. Yet, with few exceptions, "the calls for more systematic research emanating from virtually every early review of jury selection were not answered." n55

On the other side of the ledger are several articles and papers supportive of scientific jury selection. n56 Some academic researchers, most prominently Professor Gary Moran, score detractors in two respects: failing to look at actual jurors, and neglecting to utilize certain predictors of juror verdict preference. With regard to the former, Moran and his colleagues contested MacCoun's pessimistic review of the empirical research: "Few references are to studies with real jurors. When real juror verdicts are at issue, [scientific jury selection] has been shown to increase the predictability of juror verdicts appreciably, especially if the evidence in the case is at all equivocal." n57 But of the research dismissive of scientific jury selection, the most salient deficiency noted by Moran et al. is the failure to employ measures of attitude-specific issues relevant to the case being studied. Certain characteristics are not consistently generalizable predictors of verdicts. For example, one study found that males vote to convict more frequently than do females for some types of cases and less frequently than do females for others. n58 Moran et al. posited that studies measuring case-specific attitudes (and not merely demographic attributes) would prove better predictors of juror behavior. To support this assertion, four hypothetical case studies conducted by Moran et al. confirmed the hypothesis that testing case-specific attitudes toward tort reform reliably predicted conviction proneness. n59 Several other academic researchers concur as to the value of using case-specific measurements n60 because findings regarding predictor variables do not generalize across cases or jurisdictions. n61

The expensive prerequisites for using the case-specific approach, however, renders it a relatively pricey use of trial consulting time, a key consideration for clients with a more limited budget. Because nearly every study of jury decision-making indicates that the evidence presented is the primary determinant of jury verdicts, n62 trial consultants may well offer the most valuable and cost efficient assistance when they help the attorney to develop a persuasive method for presenting evidence. A study of 340 jurors in actual sex assault trials, for example, found that evidence factors accounted for thirty-four percent of the variance in jury verdicts, victim and defendant characteristics
accounted for eight percent of the variance, and jurors' characteristics and attitudes accounted for a mere two percent of the variance. n63 Similarly, community surveys in support of a change of venue or venire seem to be a generally effective use of scientific jury selection. n64 Tindale and Nagao used a computer simulation to demonstrate that the successful use of scientific jury selection for obtaining a change of venue or redrawn panel has a significantly higher impact on trial outcome than successful use of scientific jury selection to select less conviction prone jurors. n65

To recap, empirical studies testing the predictive value of scientific jury selection have produced inconclusive findings. On the one hand, supporters claim to have shown that up to thirty percent of the variance in juror verdicts can be predicted. n66 On the other hand, Hastie's own [*463] studies and review of the literature yielded these more typical observations:

It remains unclear exactly which types of cases will yield the greatest advantage to the "scientific" selection methods ... 

... "Scientific" jury selection surveys or attorney intuitions occasionally identify a subtle, case-specific predictor of verdicts. It is difficult, however, to cite even one convincingly demonstrated success of this type, and these methods frequently suggest the use of completely invalid, as well as valid, predictors ... The predictive power of these [juror] characteristics invariably turned out to be subtly dependent on specific aspects of the particular case for which they proved valid. Due to their subtlety, prospective identification of any of these factors under the conditions that prevail before actual trials remains doubtful. n67

Thus the efficacy of scientific jury selection specifically, and trial consulting generally, remains controversial. Moreover, there appears no way to assert with certainty that a successful verdict in an actual trial is directly and solely attributable to scientific jury selection. That is because the client who can afford a trial consultant is usually the same client who can afford the best attorneys, the best expert witnesses and the best investigators.

Admittedly, the services of a consultant cannot ensure success or even be proven, in a rigorous sense, to have been decisive in any given case. Further, the nature of jury decision-making and the secrecy of jury deliberations strongly suggest, if not virtually guarantee, that the actual impact of consultants, one way or the other, will continue to be immune to empirical verification. Neither verisimilitude, however, should preclude the value of relying upon the enhanced probabilities of success that trial consulting may provide. We literally run our lives by such calculations. As illustration, consider the parental decision regarding what college the child should attend. There is always the remote possibility that one student attending a mediocre college will get a better education than another student attending an Ivy League school because it may be the first student's good fortune to get the few top-quality faculty while the Ivy League student's misfortune is to take all of the poorest [*464] instructors (before they are weeded out). Most parents will nevertheless scrimp and sacrifice to pay the much higher tuition and fees necessary to send their children to the Ivy League school because it carries a substantially greater probability of a superior education. Providence usually trumps (reliance on) luck. The point here is merely to note that inability to prove the infallibility of trial consulting should not foreclose any consideration of its value. Stated differently, substantially improving the odds, if not the certainty, of victory should not be dismissed as inconsequential.

B. Expanded Use: The Market as Barometer

Absent a definitive conclusion from empirical research, other measures of the efficacy of trial consulting are available. We often use the market as a gauge of the value of goods and services. In drawing inferences as to the efficacy of trial consulting, it would betray great naivete to ignore the fact that law firms and in-house counsel look increasingly to
consultants for pretrial preparation, jury selection and trial strategy, notwithstanding both the absence of any guarantee of victory and the immoderate cost of the services. Perhaps the most revealing indicator of trial consulting efficacy are the sizable fees attorneys and their clients are willing to spend for the services. Consultants charge from $50 to $375 per hour, and work on a big case can run into the high six figures. Stolle et al. explain the rationale of the "market as barometer" perspective:

The fact that trial consultants have been able to thrive in the marketplace serves as a somewhat compelling indication that trial consulting is effective... Lawyers from the most prestigious firms in the world are increasingly relying on the services of trial consultants, with some firms even bringing consulting services in-house. It seems quite unlikely that lawyers in control of high-stakes litigation would repeatedly pay the often high cost of scientific trial consulting services if such services were ineffective... Over time the free market should weed out the less effective consultants leaving attorneys with a product of increasingly higher quality. n70

Beyond the prolific growth of the trial consulting industry in number of practitioners and total gross billings, the scope of services has also increased considerably. Although scientific jury selection remains a mainstay of the trial consultant's services, today's consultants offer many of the additional post-selection services alluded to earlier. This shift in emphasis of the services provided by the industry prompted a change by its practitioners in the preferred name of the field from "jury consulting" to "trial consulting," a preference reflected in the name of the profession's sole organization, the American Society of Trial Consultants.

C. Inference Based on Comparison with Traditional Methods

Precise assessment of trial consulting efficacy remains elusive. More easily inferable is the relative efficacy of modern trial consulting compared with the efficacy of the process it purports to render obsolete - traditional attorney methods. We can contrast the tools used by scientific jury selection with traditional attorney devices. Theory and research strongly suggest the superiority of the former; intuition and stereotypical attitudes dominate the latter. The traditional wisdom from attorneys on jury selection offers questionable presumptions regarding every imaginable demographic trait, including gender, profession, nationality, race, religion, physical features, economic strata, and even gait. Contemplate, for instance, Clarence Darrow's recommendations for jury shopping:

Never take a wealthy man on a jury. He will convict unless the defendant is accused of violating the anti-trust law, selling worthless stocks or bonds or something of that kind. An Irishman is emotional, kindly and sympathetic... Keep Unitarians, Universalists, Congregationalists, Jews and other agnostics. n72

The stereotypes and intuitions traditionally used by attorneys are means of guessing what the trial consultant learns via jury science. By using their traditional methods, trial attorneys are not seeking to divine how a particular woman or Asian or civil servant will feel about their clients. Rather, they are looking for an operating generalization upon which to base their venue selection strategy, peremptory challenges and choices of evidence and argumentation. Even with questionnaires and liberal voir dire, the attorney knows how limited the insight is that one can glean from any prospective juror. Without external information, attorneys almost inevitably rely upon stereotypes and intuitions. And it is here that the consultants' tools are superior.

The consultants' social science approach offers clear advantages over the lawyers' "lay person" techniques. First,
the consultants' approach is more case- and location-specific; demographic and attitudinal research, focus groups and mock juries are conducted in the specific community from which the jury is to be selected. Second, social scientists are trained to avoid biases and mere intuitions about human behavior and to rely instead on objective data and statistical analyses when making assessments and decisions about behavior. Third, social science uses multiple rating factors, all of which must agree before inferences are drawn. Fourth, the scientific approach usually constitutes a team effort, with the correlated benefits of consultation and feedback.

Another trial consulting advantage lies in having separate (and trained) eyes observing the courtroom. When questioning venirepersons or witnesses, presenting evidence, giving the opening statement, engaged in sidebar conference or in various other activities, the attorney cannot watch for telltale nonverbal behavior of the witnesses or jurors. Even when free to observe, we ordinarily would not expect the attorney to be more adept than the trial consultant at taking into account and assessing the jurors' vocal texture, body language and mannerisms. n73 Jury selection and argumentation are processes that unavoidably employ assumptions about individual and group behavior. Law school curricula do not offer courses teaching the related skills. n74 Whatever such knowledge may be smuggled in comes on the periphery, is incidental, and is clearly inferior to the training of a Ph.D. in psychology - which is the most common educational background of consultants. Only trial attorneys suffering from overinflated egos or hubris ardently believe there is nothing of value a qualified consulting firm can offer in selecting a jury [*467] or trying a case. As Saks concedes: "No lawyer would be harming his client by taking advantage of scientific jury selection." n75

Fulero and Penrod reviewed the studies assessing the relative efficacy of attorney folklore and scientific jury selection techniques. They found it difficult to generalize regarding the empirical evaluations of traditional attorney voir dire behavior and accuracy because of the great variation in the methods and research objectives of those studies. With this qualification, they concluded that the studies suggest that attorneys are not very accurate in their selections. By contrast, they say of scientific jury selection: "If a defendant has his or her life or a corporation has millions of dollars at stake, the jury selection advantages conferred by scientific jury selection techniques may well be worth the investment." n76

D. Survey Results and Analysis

Survey respondents were presented with a list of common consulting services and asked to indicate the relative efficacy of each service category, and each individual service falling within each category. Efficacy was defined as impact on trial outcome. A caveat to these findings is that they measure perceived impact, and not necessarily actual impact. Indeed, no known mechanism exists by which to reliably and precisely measure the influence on trial outcome of any single factor, such as relative skills of the opposing attorneys, n77 likeability of attorneys or witnesses, n78 impact of expert witnesses, n79 pretrial publicity n80 or attitude of the judge. n81 A jury's decision comprises multiple variables, including the group dynamics of the jury during deliberations. Hence influence-outcome assessment defies rigorous analysis. Nevertheless, the respondents to the survey were arguably the most knowledgeable sources of information about the impact of trial consulting on trial outcome, however imperfect that knowledge may be. Further, the impact questions were phrased so that the respondents assessed the relative efficacy of each [*468] service in general, and not as the particular respondent provided them. n82 This minimized idiosyncratic and/or self-assessment views of the respondent in favor of a generalized assessment of the impact of the services as provided by the profession as a whole.

Respondents were asked to indicate the degree to which they believed pretrial research, jury selection and courtroom presentation/strategy were the "most effective services" in terms of impact on trial outcomes. Trial consultants found jury selection the least effective category of services. Table 7 reports the means (and standard deviations) for these categories. When questioned about the most effective individual services, however, the top-rated four came from the lower-ranked categories. Case theory and presentation (ranked first) and witness preparation (ranked third) fall within the Courtroom Presentation and Strategy category, mock trial simulations (ranked second) and focus groups (ranked fourth) fall within the Pretrial Research category. Table 8 catalogs the means and standard deviations of efficacy ratings by type of service, ranked in descending order in terms of mean effectiveness.
Table 9 reports the correlations between efficacy and relative frequency as well as correlations between efficacy and percentage of time spent working for each service. We tested the hypothesis that the relative frequency of services and percentage of time that consultants spend on each service category relates to their beliefs in regard to how efficaciously the services in that category affect trial outcome. This notion would be consistent with the idea that consultants offer services in relation to their "belief" in said services. For jury selection, mean relative frequencies were positively correlated with efficacy, as well as with percentage of time spent working. For courtroom presentation and strategy, mean relative frequencies were positively correlated with efficacy as well as with percentage of time spent working. For pretrial research, mean relative frequencies were positively correlated with efficacy, but not with mean percentage of time spent working. 

Although causal relationships certainly cannot be concluded from such correlational explorations, these results suggest that differences in perceived efficacy is one plausible factor behind differences in the relative frequency of services, as well as the time consultants spend on them. We cannot be certain as to why the efficacy ratings tend to positively correlate with frequency and percentage of time spent working on the services in each category - do consultants arrange to more frequently offer what they believe to be most effective, or alternatively, do they come to believe services are more effective as a result of having more frequently provided them? This question deserves further exploration.

The survey also determined the correlations between efficacy and frequency as well as correlations between efficacy and percentage of working time spent on each individual service. All correlations were positive. Moreover, all of the efficacy-frequency correlations were significant - most of them highly significant - but many of the efficacy-percentage of time correlations were not significant at all. Furthermore, for twelve out of thirteen services, the efficacy-frequency correlations were higher than the efficacy-percentage of time correlations. Together, these differences suggest that frequency might be a better reflection of efficacy than percentage of work time. This tentative result seems plausible given that percentage of time spent on a given service might be confounded with how long a service takes to provide.

IV. Fairness

A. Consequences of the Reality and Perception of Efficacy

A second major issue involves fairness, both as popularly conceived and as contemplated under the Constitution. In trial consulting, the issues of fairness and efficacy are inextricably intertwined. If, for example, trial consulting is so effective as to impact jury composition significantly (via voir dire or peremptory challenges) or the mind sets of jurors (via conditioning), it may violate the constitutional right to an impartial jury. The impartiality mandate would seem most threatened when only one side has access to jury science. Whether or not unconstitutional, if consulting is effective, its availability to and use by one side only is arguably unfair.

With respect to jury composition, consulting may deviate from the Supreme Court-articulated paradigm of the jury trial as a cross-section of the values of the community. n85 Constitutional scholar Jeffrey Abramson writes, "the basic method of scientific jury selection contradicts the new ethic the Supreme Court set for jury selection, when it outlawed race- or sex-based peremptory challenges." n86 Other scholars concur. Hastie and Pennington concluded, "scientific jury selection methods are not applied to identify and eliminate prejudiced and partial jurors; the major effect of the lengthy examinations and the exercise of peremptory challenges is to create systematically unrepresentative
panels and, sometimes, to produce unbalanced juries." n87 Nevertheless, until more convincing evidence of the ability of scientific jury selection to affect verdicts surfaces, there appears no sustainable argument that its use threatens the constitutional right to an impartial jury or the Court-mandated injunction to seek cross-sectional juries. Scientific jury selection will most likely not change the unfair exclusion of some Americans from jury service; it will merely substitute exclusions based on scientific analysis for those derived from stereotypes and intuition.

In terms of conditioning the mind sets of selected jurors, we may never know precisely how effective any trial consulting techniques are, collectively or in the disaggregate, given the inherent problems of measurement. Notwithstanding the absence of such an unequivocal determination, some believe that trial consulting creates an untoward [*473] public perception of the jury being manipulated by psychological devices, n88 in essence, high-tech jury tampering. This, in turn, detracts from the legitimacy juries bring to the administration of trial justice and also detracts from the goals of trial consultants who work for justice. For the appearance of justice is as important as the reality in order to preserve and maintain public support for an instrument or an institution of justice. The presence of consultants in high profile verdicts that seem more the product of bias than evidence feeds skepticism about the jury system. n89 Instead of a jury representing a cross-section of the values of the community, it may seem a body stacked with people holding biases favoring the side with the trial consultant, or the best trial consultant. And rather than being aimed at uncovering evidence presented to reveal the truth, the trial may appear an exercise in enhancing juror biases. n90

[*474] The perceived fairness of trial consulting is an empirical issue capable of being experimentally evaluated. In a recent study, investigators tested how the use of a psychologist trial consultant for jury selection and trial preparation impacted the perceived fairness of trial procedures and outcomes. A key finding was the effect of balance on perceived fairness - procedural due process was seen as more fair when there was a balance in either the presence or absence of trial consultants. In other words, trial procedure was generally seen as fair when both sides had a consultant or neither side had a consultant. n91

B. Only Affordable by the Wealthy

From its public interest beginnings, trial consulting has evolved into high stakes poker. The escalating costs of trial consulting render it a service available almost exclusively to the rich - typically corporations, governments and wealthy individuals. n92 A Los Angeles attorney who often uses trial consultants noted, "very few trial consultants can come in and do any meaningful work for less than 50,000 or 100,000 bucks." n93 A New Rochelle, New York trial consultant adds that "a full scale workup can run as much as $ 500,000." n94 This widens the already-substantial advantage of the wealthy who can afford the best legal representation, investigators, and expert witnesses. When only one party can afford jury selection experts, it puts into relief the imbalances created by a mismatch of client resources and raises controversial questions: Does allowing government, large corporations, and wealthy individuals to have such an advantage over their opponents undermine the very foundation of a fair trial? n95 Might not the resulting competitive disadvantages of poorer litigants have a chilling effect on the exercise of their constitutional rights?

Hans and Vidmar project this line of thought further. They indicate that the potential imbalance created by the one-sided use of scientific jury selection threatens the institutional justifiability of the adversary system in jury trials:

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Within the adversarial context, it is presumed each side will eliminate those prospective jurors most favorable to the other side and that the end result will be an impartial jury. Yet this assumes equal resources and skills for the two sides. The viability of the adversary system to ensure a fair and impartial jury and trial, in jury selection as well as in other stages of the trial, is sorely tested when the adversaries possess unequal resources. In this light, the major ethical problem with social science in the courtroom is not the techniques themselves but rather the fact that, in our society, the condition for equality of resources is most often not met. Jury experts may exacerbate the impact of such disparities. There are no easy answers in this ethical quagmire, since the issues extend beyond the techniques themselves to the
nature and functioning of the adversary system itself. But those who conduct and those who benefit from the new developments in jury selection must constantly confront the ethical issues. n96

Saks suggests that we must look at the social and legal context within which scientific jury selection occurs before rendering ethical judgments. He writes:

If both sides have social science help... scientific jury selection would make the goal of impartial jury decisions more attainable than has ever before been possible ... But, the critics would interject, the presence of such expertise on both sides is a fantasy that ignores the realities of justice in America. Today only the wealthy and celebrated have such help, and tomorrow the only additional people to have it will be prosecutors, and they will use it routinely ... But it does not demonstrate some evil inherent in scientific jury selection. It points instead to a fundamental inequity in our courts. n97

In a sense then, what is "unfair" about trial consulting is a metaphor for what is unfair about the adversary system as a whole. Mismatches of litigant resources result in mismatches of affordable professional services between opposing litigants. Some of those additional services that the wealthier litigants can purchase undoubtedly redound to their benefit. All other variables being equal, the side with the more skilled attorney, more persuasive expert witnesses, more thorough investigators and more [*476] insightful trial consultant will probably fare better than the opposition in a substantial number of cases. Similarly, the litigant who can afford the best trial consultants - performing an array of services from pretrial community surveys and mock trials, to extensive voir dire and peremptory challenge analyses, to courtroom observation and trial strategy, and supplemented with state-of-the-art graphic presentations - will probably hold a significant edge against the litigant who can afford little if any of these services. Trial consultants would likely counter this argument by noting that it is no more unfair for the wealthier clients to hire more and better trial consultants than it is for them to hire more and better attorneys and expert witnesses. However, at some point the cumulative effect of resource-based litigation advantages available only to the wealthy must give pause.

C. The Distinctiveness of Jury Selection

Although the consensus is that evidence is more outcome-determinative than jury selection, n98 and therefore post-selection services are probably more important than jury selection, it is nevertheless the latter that draw the most light and heat. n99 Given that one of the central issues of trial consulting is the unfair advantage it may give to those who can afford it, and since it is presumably better to spend limited client resources on post-selection services, why does jury selection attract a disproportionate share of attention? Two compatible answers can be offered.

1. Scientific Jury Selection is Qualitatively Different from Post-Selection Services

Post-selection services refer primarily to those enhancing evidence presentation and argumentation, that is, traditional attorney functions. As such, they do not seem to go beyond the conventional bounds of legal representation and adversary advocacy. Conversely, scientific jury selection techniques are almost exclusively extralegal psychological devices that may seem to many to transgress the rules of what is a "fair trial." Put differently, it may seem acceptable to help the attorney be a better attorney in trial, but unacceptable to "stack the deck" before the trial starts. People will more readily accept courtroom persuasion by the [*477] attorney - even excessive and pandering tactics - than they will social science techniques by unseen behaviorists aimed at what some may regard as "fixing the jury" by altering its composition. This can appear an unfair deviation from the rules of the game.
2. Jury Selection is Sacrosanct Because the Jury is Sacrosanct

The jury is an enduring institution of American trial justice whose special status stems from colonial times, when it served as a bulwark against England’s crown-appointed judges. So esteemed is the jury that it is the only decision-making body legally empowered to nullify the law and vote its collective conscience. Consequently, perceived tampering with jury selection by trial consultants may be perceived as tantamount to undermining a cornerstone of trial justice.

V. Professional Standards

A third major issue in trial consulting implicates professional ethics and standards. Many if not most professions applying academically oriented skills, such as medicine, law, accounting and psychology, are regulated to the extent necessary to protect the public against unskilled or unscrupulous practitioners. Much of this regulation takes the form of state licensing or certification. Often there is a continuing education requirement, instilling some public confidence that the practitioner keeps abreast of germane new knowledge and developments. Additionally, professional associations frequently prescribe ethical standards in a code of behavior. In a relatively new and explosively developing field such as trial consulting, the establishment of such standards is critical: Practitioners need guidelines with which to navigate ethically nebulous terrain. The public needs assurance that the profession sincerely intends to abide by some sort of moral compass.

A. An Unregulated Profession

The trial consulting industry is presently unregulated. Anyone can enter the field and identify him- or herself as a trial consultant. Without professional qualifications and binding ethical restrictions, untrained, incompetent, and unscrupulous individuals can advertise and practice with impunity. Further, there are no continuing education requirements. Coupled with the as yet unprovable precise relationship between trial consulting services and trial outcome, this conduces an environment favorable to practitioners of questionable competence and ethics, since those practitioners without traditional credentials must, of necessity, be adroit at self-promotion. To this end, they often lay claim to a win-loss record in their advertising.

B. ASTC Standards Are Minimal

The industry’s professional organization, the American Society of Trial Consultants (ASTC), does not require any specific credentials for membership or restrict its members’ advertising in any way. The ASTC has a Code of Professional Standards. These standards are rather anemic, however, and not nearly as rigorous as those of the American Psychological Association (APA). Herbsleb et al. suggest that some current practices of trial consultants may violate APA standards. To the extent that social scientists help produce biased juries, they violate APA standards requiring psychologists to avoid any action violating or diminishing anyone's legal rights. Advising psychologists also breach APA rules to "limit their practice to their demonstrated areas of professional competence" when they are not honest to clients as to what they can do in the legal field. Another APA standard requires that subjects be free to decline and withdraw from research. At least one commentator has suggested that since jurors are sometimes unaware of jury research of their case and cannot decline to serve, the only solution would be court announcement and asking jurors if they object.

From the standpoint of the legal profession, at least one practice of trial consultants, if committed by an attorney, might ostensibly violate the ethical standards of the bar. Trial consultants’ advertising of past successes would violate the American Bar Association’s Model Rules of Professional Conduct (MRPC). Rule 7.1(b) forbids communications likely to create unjustified expectations about achievable results. Hence the ethical standards of the trial consulting profession are arguably more lax than those of the two professions - psychology and law - that
necessarily suffuse and co-exist with trial consulting.

C. Investigations of Prospective Jurors

A considerable part of the impetus for ethical standards crystallizes around pretrial investigations of prospective jurors by trial consultants. Many investigational procedures skirt the outer limitations of acceptable practices. Some investigations may even constitute jury tampering, obstruction of justice or invasion of privacy. MRPC Rules forbid attorneys from communicating with or seeking to influence jurors or prospective jurors, and extend vicarious liability for the actions of those working under them or retained by them for conduct that would be a violation of the rules if engaged in by the attorney. Herbsleb et al. offer the following illustration of how an ostensibly innocuous pretrial investigation procedure can run afoul of the law. In developing a community network model, trial consultants usually rely on friends of the defendant or other non-professionals untrained in the skills necessary for this type of information gathering. There is a high probability some of these nonprofessionals will act or appear "suspicious." If a person so contacted by such a person in the network informs a prospective juror that persons of questionable character or motive are conducting an investigation into his or her personal affairs, the prospective juror may well feel threatened or intimidated. This type of practice may constitute obstruction of justice. The federal statute, for example, defines obstruction of justice as "whoever corruptly...endeavors to influence, intimidate, or impede any grand or petit juror...in the discharge of his duty." Importantly, this section has been held to apply to prospective jurors as well as sworn jurors.

Prospective jurors may experience another invasion of their privacy in court, during voir dire. The questioning of prospective jurors can sometimes delve protractedly into intensely private and intimate details of the questioned individual's life. Responsibility often lies with the trial consultant as well as with the interrogating attorney. All trial attorneys want to make the most informed and effective use of their peremptory challenges. To this end, they employ trial consultants who may suggest voir dire interrogations that might violate privacy. This affront to the sensibilities of the panelists might nonetheless be justifiable, on balance, if there were clearly demonstrable countervailing benefits. That assessment, however, has not been universal. Contrasting our system with that of England, where both peremptory challenges and pretrial investigations have been virtually eliminated, one scholar observed: "In the United States, where voir dire allows for vast intrusions into individuals' lives, the result has not been greater impartiality, but a proliferation of methods by which skilled litigators and expensive consultants tailor juries to their clients' needs."

VI. Proposed Reforms

Several reforms have been proposed in response to these issues. Their adoptions would variously affect the growth of the industry, the nature and quality of the tools used by trial consultants, and the qualifications of the practitioners. Save for the last (appointment of consultants for indigents), all would constrain, directly or indirectly, some aspect of consulting or the range of individuals who can practice. Some of the commonly voiced proposals follow.

A. Outlawing Trial Consulting by Nonlawyers

Obviously the most draconian response to the perceived ills of trial consulting, this measure was proposed by Illinois Senate President James Philip in 1995, and has some support in the academic community. A spokesperson for Philip expressed the senator's rationale: "It's an inappropriate way to influence the jury system...The whole role of a jury consultant is to stack the deck." A related proposal, to eliminate the use of jury science altogether, would have an identical effect.

Unless advocates of this proposal can demonstrate something singularly pernicious about consulting, such as unduly facilitating or encouraging race- or gender-based juror exclusions outlawed by the Supreme Court, they would leave themselves open to a reductio ad absurdum attack. That is, if consultants are banned on grounds of unfair advantage, why not also ban expert witnesses, investigators and all the other professions in the proliferating field of litigation support? More generally, abolition is an atypical and improbable response to any area of commerce not
considered dangerous to health or safety. As a practical matter, legislators who vote to outlaw the livelihoods of well-organized constituents tend to have short political careers.

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B. Limiting Voir Dire Questioning by Attorneys n122

Scientific jury selection usually extends the voir dire questioning by attorneys who heed their consultants' suggestions. Such questioning is the best way for trial consultants to confirm their hypotheses and assumptions about prospective jurors. But as the O.J. Simpson criminal case demonstrated, this extended voir dire can be quite lengthy and excessive. Further, it can allow the side with the most resources to obtain an advantage. More importantly, the object, as Hastie and Pennington charge, may be to create substantially unrepresentative panels. n123 Thus they and others n124 advocate reforms to limit voir dire questioning by attorneys.

One potentially consequential downside of such a reform may be less candor in the voir dire responses of prospective jurors. In one study, attorneys were more successful than judges in eliciting candid disclosures from prospective jurors. n125 Under the proposal to limit voir dire questioning, the trial judge would conduct most of the voir dire, with attorneys retaining the right to submit proposed supplemental questions.

The debate over judge-versus attorney-conducted voir dire has been waged with brio for quite a while. In general, trial attorneys claim that restrictions on their voir dire inhibits their ability to make informed use of their peremptory challenges, and that judges are not as motivated, or effective, in fleshing out potential juror bias. Judges counter that attorneys use voir dire for improper purposes, such as conditioning potential jurors, and unnecessarily prolonging trial time. n126 How consultant-inspired extended voir dire is to be treated will probably be [*483] subsumed by the larger debate over control of voir dire, a debate likely to occur in the legislatures of many, if not all, states.

C. Reducing or Eliminating Peremptory Challenges

One of the most common trial reform proposals is to reduce or eliminate peremptory challenges. In Batson v. Kentucky, Supreme Court Justice Thurgood Marshall urged complete elimination of peremptory challenges. n127 Other scholars have embraced Marshall's proposal, but in furtherance of a different end: curtailing the perceived inequities of trial consulting. n128 Peremptory challenges are the primary means by which the information derived from voir dire comes to fruition. Thus, this proposal is often made in concert with limiting attorney-conducted voir dire. Eliminating the attorney's ability to use the trial consultant's advice in strategically picking the composition of the jury would undercut scientific jury selection. n129 Instructively, the British have all but eliminated peremptory challenges. n130

As with the proposal to limit attorney voir dire, this reform proposal has a long and contentious past. Proponents maintain that the peremptory challenge: (a) is a limited privilege, neither constitutionally protected nor essential to a fair trial; and (b) perpetuates forbidden stereotypes. n131 [*484] Trial attorneys claim that reducing or eliminating peremptory challenges would immeasurably impair their clients' rights to impartial juries. If peremptory challenges were eliminated or severely restricted, it is not unlikely that at least some trial judges would adopt a more expansive definition of the challenge for cause as an anodyne.

The principal defense of peremptory challenges is the protection they can provide. If the jurisdiction is one that limits voir dire inquiry, or prospective jurors are not candid about their biases, the voir dire process will not provide adequate opportunity to create grounds for a challenge for cause. In that event, the peremptory challenge offers a valuable alternative means of dismissing a prospective juror whose suspected bias is not sufficiently manifested to support a challenge for cause. Professor Barbara Babcock argues that the elimination of peremptory challenges would invest judges with virtually unreviewable discretion by limiting litigants to challenges for cause. n132
Mere restriction of peremptory challenges, as opposed to elimination, may have an ironic result. The fewer the number of permitted peremptory challenges, the more preciously they will no doubt be regarded by some litigators - too precious to be used in major litigation without first seeking the advice of a trial consultant. Thus a measure designed to limit the influence of trial consultants may have the opposite effect.

D. Allowing Discovery of Consultant Surveys

Requiring the sharing of the trial consultant's raw survey data via discovery would vastly mitigate, if not eradicate, the competitive advantage of hiring a consultant. Release of the survey findings would plausibly increase the chances of impaneling an impartial jury, and relieve the perceived and actual unfairness of one-sided use of such information. But case law about attorney work product seems to contravene this proposal. The work product doctrine has been interpreted as barring or limiting the discovery of juror information. The federal procedural rules governing criminal and civil trials in the federal courts serve as models for the states in resolution of these issues; however, the applicable federal rules do not directly address the discoverability of trial consultant surveys or the product of any other consultant investigation. Nor is it clear that the discovery of such information falls within any categories of the relevant federal rules.

A discussion of the relative merits of the discovery proposal yields issues that address the underlying justifications for trial consulting. A trial consultant is likely to state for the record that his or her jury selection suggestions are to eliminate biased prospective jurors in the service of constituting an impartial jury, and to recommend evidence and strategies that make the evidence clearer to the jurors, that is, to enhance the exercise of juror rationality. But trial consultants are under no more constraint to seek truth and justice than are the attorneys they assist. A resulting ethical issue for consultants and all other social scientists retained by trial counsel persists. Social scientists who participate in the adversarial attempt to obtain favorable jurors tarnish the image of their profession. Serving in this capacity, the paid expert should have no false illusions; no one wants to hire an "ivory tower" consultant to assist in selecting a "fair and impartial" jury.

Although the narrow issue of attorney work product will likely inform future debate over this proposal, another route to publication of the same survey data is possible. If either party convinces the court that impaneling an impartial jury will be problematic, the court has a nonpartisan alternative to the choices of doing nothing or an immediate change of venue or venire. At its discretion, the court could order a community survey by a neutral party, such as a court-appointed master or other expert, under the Federal Rules of Evidence, the Federal Rules of Civil Procedure or comparable state statutes. Courts have used this power in appointing experts to assist in pretrial activities in numerous instances. For example, lower courts in appropriate cases have been willing to fund court-appointed handwriting analysts, fingerprint experts, forensic psychologists, ballistics experts, and general investigators. It would not be an illogical leap to extend this authority to trial consultants for their community surveys.

E. Requiring Disclosure of the Use of Trial Consultants

Mandatory disclosure of the use of a trial consultant could serve several purposes. It would give the opposing party the opportunity to hire his or her own consultant, and the indigent criminal defendant the chance to request the court to appoint one. It would also facilitate study into the use of jury science. Gold suggests this proposal be effected by giving the judge the power to compel disclosure. The disclosure could be made through a pretrial memorandum to the judge describing the advice received from the consultant and plans to implement that advice at trial.

This is a middle-ground proposal, neither banning non-attorney consulting nor allowing discovery of the consultant's research. But it is vulnerable to the same criticism as a ban: For example, consistency requires a justification of why all other forms of litigation support should not also be disclosed. One possible consequence of a required disclosure of consultants might be that suggested earlier - attorneys who did not respond to such a disclosure...
by hiring their own trial consultant might open themselves to a charge of malpractice. n156 Were that to occur, trial consultants would indirectly benefit from the implementation of this proposal.

F. Barring Pretrial Investigations of Jurors and Prospective Jurors

Several avenues could be explored to protect the privacy and sensibilities of jurors and prospective jurors from pretrial investigations and unduly invasive questions in court. One would be to outlaw, as they do in Great Britain and Canada, intrusive pretrial investigations. n157 A second would require that jurors receive notice: (a) that their names are to be made public; (b) of the right to petition to suppress that information; and (c) of the right to ensure that their in-court responses to voir dire questions are kept private. That would at least keep inquiries into their private lives within the confines of the courtroom. n158 A third would bar questionnaires and all other forms of questions which inquire into subjects unrelated to impartiality, or that are otherwise harassing. n159 At issue are questions such as whether a prospective juror "ever dated a person of a different race," whether religion is "important" to that prospective juror's life, or whether the prospective juror has undergone amniocentesis. n160 A fourth would be judicial measures that indirectly but effectively prevent juror investigation. Augmenting the size of the venire, for example, would sharply decrease the feasibility of juror investigation; it is one thing to investigate thirty persons, but quite another to investigate three hundred. n161 Alternatively, the judge can withhold the juror list until immediately before trial. n162 An attorney deprived of juror identities until a few days before trial lacks adequate time to investigate.

A British-type outright ban is draconian, and would preclude the undeniable benefits of pretrial investigations. Without such investigations attorneys could not verify the truth of responses to voir dire questions. The Supreme Court has ruled that a prospective juror's dishonest response to a material voir dire question can justify a new trial if the response would have provided a valid basis for a challenge for cause. n163 Further, unverifiable voir dire responses would frustrate the intelligent exercise of peremptory challenges and the basis of information for challenging the nonrepresentative character of the venire. Pretrial investigations offer practical advantages as well. Information gained during the investigation should commensurately shorten voir dire time. And untruthful jurors would be spared the potential embarrassment of exposing their dishonesty in court.

Among the other alternatives, a question-by-question review of all juror questionnaires would be highly subjective and occupy an unacceptable amount of the judge's time. Assuming that the most conservative proposals have the best chance of adoption, the notice requirements seem the most likely option to be acted upon. Juror privacy concerns are being discussed in several state legislatures n164 under the rubric of a "Juror Bill of Rights." Recently, the District of Columbia's Council for Court Excellence's recommendations included informing the jury when serious security concerns cause the court to order that the jury be anonymous, and allaying concerns in all other instances by providing jurors with full explanations of exactly what specific information about them is made available and to whom. n165

G. Requiring State Licensing of Consultants

The incidence of professional incompetence increases when, as with trial consultants, the field of practice has no entry requirements or monitoring. Incompetence begets malpractice litigation. The question is whether that will remain the sole protection for users of trial consulting services.

If the experience of professionals in the related fields of law and psychology were a reliable barometer, the eventual state licensing of trial consultants would seem inevitable. As the number of practitioners expands, consumers (mostly trial attorneys) will demand some external indicia of minimum education, knowledge or ethical standards before committing thousands of dollars for the services of a consultant. Knowledgeable consumers will also want the security that a licensing body provides: established minimal educational background for certification; penalties against those who falsely advertise themselves as licensed; and sanctions against licensed practitioners who violate the standards of the licensing body. A licensing body would probably also install a continuing education requirement similar to that applicable to licensed attorneys and psychologists to ensure that licensees continue to inform themselves of new developments in their field. Psychologist and attorney Robert Gordon suggests that once trial consultants are
required to be licensed, they would be responsible for reporting the unethical conduct of their colleagues to the licensing body and the court. n166

Potential benefits and drawbacks attend the licensing proposal. On the salutary side, licensing would establish minimum entry standards of competence and professional ethics. A licensing body could stipulate educational credentials, passage of state sanctioned tests, experience or some combination of the three as the prerequisite to practice. Additional public protection (against the unskilled or unsavory practitioner) could be provided through the ongoing oversight of the licensing body or other designated monitoring office. n167 Licensing would undoubtedly lend legitimacy to, and enhance the stature of, the profession. As trial consulting proliferates and comes under waxing public scrutiny, particularly as a consequence of unpopular jury verdicts, the state's imprimatur would be invaluable.

A final projected benefit of licensing is the possible stimulus to scholarship. Once trial consulting is licensed, educational training programs will almost certainly follow. Those programs housed in traditional, accredited colleges and universities should produce commensurate scholarly research. n168

On the down side, licensing carries potential drawbacks. Limiting entry to any field drives up the fees of the field's practitioners. As their prices escalate, trial consultant services become even less accessible, [*490] exacerbating an already sensitive issue. n169 Licensing requires a licensing body, another bureaucracy with attendant costs. Initially funded by fees charged to licensees, these costs would be passed on to the consumers of trial consulting services - private attorneys, governments, and corporations - and eventually borne by clients, constituents, and customers, respectively. Coupled with the expected increase in trial consulting prices, these additional bureaucratic costs would represent a significant diminution in the affordability of trial consulting services for most litigants.

Another anticipated objection to licensing trial consultants would target the presumed preeminent goal of the licensing process - the competency of the licensee. If trial consulting is more art than science, n170 then no amount of education, test-taking, or experience will guarantee competence. By the same token, licensing would freeze out many gifted consultants who cannot or will not meet the necessary conditions for licensing. Proponents of this position would urge the marketplace as the optimal device for ferreting out incompetence.

The response to this objection would be that licensing is no more a guarantee of competence than the use of a competent trial consultant is a guarantee of ultimate success at trial. Licensing in any field warrants only an inference that certain minimum criteria in education, experience, and the like, have been met. Moreover, the rigor of the licensing requirements tends to vary with the risk to the public from incompetent licensees: the more that public safety or health are at stake, the more demanding the licensing prerequisites. That is why physicians must serve a year of internship (in addition to passing the medical board exams) in order to practice, whereas attorneys need only pass a bar exam. Incompetent trial consulting certainly does not directly jeopardize public safety or health, but licensing could offer an appropriate degree of assurance that the licensee has met and continues to meet prescribed standards that suggest, if not guarantee, a base level of competence.

Similarly, licensing and a regulatory body do not guarantee the ethics of those licensed. Nevertheless, they do delineate a clear ethical framework for licensees. Using typical bar entrance requirements as a paradigm, applicants could be required to take a course in the accepted ethics and standards of the profession, and pass an ethics exam and/or demonstrate a record absent moral turpitude before being admitted to practice. Once licensed, the practitioner could be subject to license [*491] suspension, revocation or other sanctions for actions beyond the pale by an oversight board.

H. Upgrading Professional Standards

If the states do not require licensing, then the ASTC - or another group speaking for the profession - may feel compelled to fortify its existing Code of Professional Standards. History indicates that the state is more likely to step in and regulate where self-governance appears inadequate to protect the public. The ASTC could limit its membership to
those with prescribed minimum experiential or educational backgrounds and training. Another provision that could inure to the benefit of the profession and the public is a required percentage of pro bono service from members. The existing Code merely encourages pro bono service, and in terms so broad as to be unclear if the exhortation could be satisfied by other services. n172 If the ASTC adds to the rigor and specificity of its ethical and professional standards, it might induce more respect and trust on behalf of jurors, clients, judges and the general public - assets of inestimable value to a profession whose good will may be waning.

Gordon has proposed the following ten ethical principles for trial consultants:

1. Trial consultants must possess both a thorough knowledge of the legal system and an expertise in the research methodologies used in behavioral sciences ...

2. Trial consultants must respect the legal system ...

3. The privacy and sensibilities of jurors and prospective jurors must be respected ...

4. It is the responsibility of the trial consultant to assist in theseating of fair and impartial juries ...

5. Trial consultants must strive to ensure that the testimony or witnesses is truthful and accurate...

6. The rights of clients must be protected ...

7. Trial and settlement scientists must provide objective and reasoned opinions...

8. Trial consultants shall contribute to the amicable resolution of disputes...

9. Trial consultants shall accurately and truthfully present their credentials to the bar and the judiciary ...

10. Trial consultants shall keep current with research and theory in the field and seek to advance and share their knowledge. n173

Some of these principles exceed, in varying degrees, all comparable constraints in the ASTC Code. For example, Gordon's first principle requires a "thorough" legal knowledge and "expertise" in behavioral research, and the tenth principle requires current knowledge of research and theory; whereas the ASTC Code of Professional Standards requires only full disclosure of "academic qualifications and consulting experience," n174 and provision of services "in accordance with the current practices, methodologies, and the professional standards of the field involved." n175

Gordon's third, fourth, fifth, and eighth principles mandate levels of professional responsibility with no true counterparts in the ASTC Code. The only related constraint in the ASTC Code is the prohibition against providing services "with the intent of jeopardizing the integrity of the jury pool." n176 By inference, then, unintentional but negligent jeopardizing of the jury pool's integrity is but a venial offense.

Conversely, the ASTC Code contains standards with no counterpart in Gordon's list. For example, the ASTC Code specifically proscribes publication of a win-loss record n177 and misrepresentative advertising, n178 bars conflicts of interests, n179 and exhorts its members to perform pro bono services annually. n180 Conceivably, an amalgam of these two sets of standards will eventuate. Until then, the ASTC standards remain uninspiring as well as unenforceable.
I. Trial Consultant Views on Professional Standards and Ethics

Consultants offered their views regarding certain ideas of regulation and ethics. 55.4% indicated disagreement with the notion that trial consultants should be licensed by the state. 29.2% favored licensing, and 15.5% were "uncertain" about their attitude toward licensing. Table 10 catalogues the degree to which respondents indicated agreement with the idea that trial consultants should be licensed by the state.

[SEE TABLE IN ORIGINAL]

In an open-ended comment, one of the survey respondents who opposed licensing rhetorically inquired why trial consultants should be licensed if expert witnesses are not. This is an apt observation, as both the expert witness and the trial consultant are on the hiring attorney's "team," retained to persuade the factfinder. Legitimate reasons justify discriminating between the two services, however. Unlike trial consultants, expert witnesses do not work covertly. They are identified to the court as witnesses for one of the litigants. Moreover, expert witnesses are subject to cross-examination - perhaps the single greatest due process protection offered by the adversary system - and to the scrutiny of the factfinder. Another distinction is that because expert witnesses are verifiably expert, credentials are ordinarily not an issue. Conversely, trial consultants need not have verifiable credentials, a state of affairs commensurately raising the prospects of incompetence.

Self-interest militates in favor of opposing licensing for many trial consultants: they may not meet the minimum qualifications, such as competency or character tests; or they may be averse to the time and costs of obtaining additional qualifications required by the state. On the other hand, we can postulate some benefits to licensing for the upper-echelon consultants who are most likely to survive the winnowing out of the licensing process: higher public regard for state licensees, less competition and higher fees.

In terms of our survey, consultants indicated an overall slight agreement with the idea that the ASTC Code of Professional Standards establishes an adequate level of professional conduct and client protection. They also indicated an overall slight disagreement with the idea the trial consultants should be licensed by the state. Respondents expressed uncertainty, as opposed to agreement or disagreement, with the idea that if the trial consulting profession does not increase its self-regulation, the government will step in and regulate it.

J. Appointment of Trial Consultants for Indigents

Not all of the proposals regarding trial consulting are constricting. Indigent criminal defendants often petition the court for experts such as trial consultants, private investigators and psychologists on grounds that they are necessary for due process in their case. Judges occasionally oblige. In the 1993 trial of the two men charged with the attempted murder of Reginald Denny, Los Angeles Superior Court judge John Ouderkirk appointed Jo-Ellan Dimitrius of Litigation Sciences, Inc. to assist the defense.

Judge Ouderkirk's appointment may harbinger a return to sociologist Jay Schulman's original goal of leveling the playing field. Most other state courts have not found trial consultants necessary to the defendants' due process rights. However, in Ake v. Oklahoma, the Supreme Court held that the state must provide an indigent defendant with a psychologist when the sanity of the defendant is a substantial factor at trial. Consequently, court funding for trial consultants continues at the discretion of the trial judge unless the Ake "substantial factor at the time of trial" condition is met. Courts disposed to funding indigents' requests for trial consultants will look for case authority to Ake, or for statutory authority to the federal Criminal Justice Act of 1964 or similar state statutes. The Criminal Justice Act allows indigents to request expert services that are "necessary for adequate representation."

VII. Conclusion

The trial consulting industry presents a puzzle: If trial consulting is effective, then it may be unfair on several grounds,
especially if available to one side only; if not effective, then it unnecessarily adds to the cost and time of trials. The two possibilities are in tension with each other.

Judges and legislators have not yet addressed another waxing tension, one regarding the professional responsibilities of trial consultants. On the one hand, we have witnessed the vertiginous growth in the number of trial consultants and the cost of their services. On the other hand, that growth has been realized devoid of any standards or regulation from within or without the profession. Roiling the trial consulting phenomenon further is the perception of it by some critics as jury tampering. Collectively, [*496] these tensions augur changes profoundly affecting this dynamic but controversial profession.

The trial consulting industry may respond to these concerns by embracing self-regulation more rigorously and, in the process, preempt or at least temporarily stave off state licensing or other forms of government regulation. But the remediation must be substantive, not cosmetic. Trial consultants cannot simply put a felt tip on their hammer if they are still using the hammer to break into the bank.

From a broader perspective, the relationship of trial consulting and the adversary system - as practiced in American courts - can be analogized to that of capitalism and government regulation of business. Capitalism is demonstrably the driving force of economic prosperity, but beginning in the nineteenth century, the government began incrementally softening complete laissez-faire capitalism in favor of a vacillating but typically mild degree of government regulation for the protection of consumers, competitors and the general public. Similarly, the adversary system, said by Wigmore to be the great engine of truth in trial court dispute resolution, n190 and assessed by researchers to be perceived as the most procedurally just, n191 has nevertheless been moderated by judicial discretion and legislative constraints so that it is not the unfettered exercise of zealous advocacy. Trial consulting, in all its varied forms, is the newest tool in the adversary system attorney's arsenal. Its efficacy, albeit immeasurable with precision, is potentially great, with commensurate potential injustice to the side with no consultant or an incompetent one. When judges or legislatures seek to temper the impact of trial consulting, they are merely following a tradition of government mediation of forces that are salutary for the most part, yet potentially deleterious if left unbridled.

In one generation the trial consulting phenomenon has profoundly reshaped the litigation scene. Can we simply graft it onto our legal structure? In few other areas is the need to vet unplanned developments so importunate as in the judicial process. Whether the unfolding pattern [*497] emerges as boon or specter, the law's tensile strength will be tested in the attempt to accommodate the explosive change.

[*498]

APPENDIX

[SEE FIGURES IN ORIGINAL] [*499]

[SEE FIGURES IN ORIGINAL]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral Overview

FOOTNOTES:

n1. Several unpopular jury decisions linked by the involvement of trial consultants have elevated public scrutiny of this profession. Consultants were heralded as winning or helping to gain a favorable outcome in the
O.J. Simpson criminal trial (where the prosecution refused to accept the jury selection advice of its consultant, Donald Vinson), the first Rodney King trial, the first Menendez Brothers trial, the trial of New York "subway vigilante" Bernhard Goetz, and the William Kennedy Smith rape trial. Included on the civil side would be the recent jury award in excess of $2 million to compensate a McDonald's customer for injuries attributable to coffee that was "too hot," and the staggering $10.5 billion awarded Pennzoil in 1985 by a Texas jury in its suit against Texaco. Considerable media attention was given to all of these cases. For brief reviews of some of the sequels on each, see Saul M. Kassin & Lawrence S. Wrightsman, The American Jury on Trial: Psychological Perspectives 1-3 (1988) (discussing the events surrounding the Texaco case); Court TV This Week, Legal Times, Nov. 25, 1996, at 58 (discussing one of Goetz's victim's $50 million suit); Jonathan Foreman, He Serves Fries and Legal McNuggets, Nat'l J., Feb. 3, 1997, at B1 (discussing plaintiff settling with McDonald's after jury award in excess of $2 million); Mark Hansen, Finding Sympathetic Jurors: William Kennedy Smith Defense Lawyer Reveals His Tactics, A.B.A. J., Apr. 1992, at 29; Steven Keeva & Stephanie B. Goldberg, Panel Proposes Changes After O.J. Trial Experience, A.B.A. J., Oct. 1996, at 118; K. Offgang, Menendez Conviction Affirmed by Court of Appeal Deck, Metropolitan News-Enter., Mar. 28, 1991, at 1; M.A. Stapleton, Can't Argue with the Power of Technology: Jury Consultant, Chi. Daily L. Bull., Apr. 10, 1997, at B1 (noting impact of the trial consultant in the trial of officers who beat Rodney King).


n4. Stephen J. Adler, Litigation Science: Consultants Dope out the Mysteries of Jurors for Clients Being Sued, Wall St. J., Oct. 24, 1989, at 1 (quoting Donald Zoeller). Zoeller's assessment has support. The Sixth Amendment guarantees the assistance of counsel in criminal prosecutions. U.S. Const. amend. VI. According to the United States Supreme Court, this assistance must be reasonably effective. See Strickland v. Washington, 466 U.S. 668, 687-98 (1984). It is not an illogical leap to infer that such assistance includes an attorney's role in jury selection. See, e.g., Commonwealth v. Stitzel, 454 A.2d 1072, 1074-76 (Pa. Super. Ct. 1982) (holding that the failure to exercise a peremptory challenge to remove a potentially biased juror can constitute ineffective assistance of counsel). Even the American Bar Association has acknowledged that a trial consultant may be necessary if an attorney is to provide competent representation. In death penalty cases, an ABA report admonished that consultants can help determine what "invisible but lethal [amounts] of prejudice may exist in the jury pool." American Bar Assn., Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 117 (1989).


n7. One of the most elaborate and comprehensive uses of scientific jury selection was that employed by MCI in its antitrust suit against AT&T in 1980. MCI's jury researchers first conducted an extensive poll of local residents to ascertain the demographic characteristics of individuals likely to side with or against MCI. Then, mock juries composed of individuals with varying sympathies toward MCI listened to abbreviated presentations of both sides by MCI's attorneys. During the mock jury deliberations, MCI's attorneys and researchers watched and listened from behind one-way mirrors. From their observations, the MCI attorneys learned what jurors to
challenge during voir dire. They also gained strategic insights into the types of arguments to employ with different types of people. Their efforts were amply rewarded. The jury awarded MCI $600 million. After tripling these damages per antitrust law, see 15 U.S.C. 15 (1994), the total judgment was a hefty $1.8 billion, the largest antitrust judgment of all time. See Valerie P. Hans & Neil Vidmar, Judging the Jury 79-80 (1986) for a discussion of the events surrounding the case.

n8. See Michael J. Saks, Social Scientists Can't Rig Juries, in In the Jury Box: Controversies in the Courtroom 48, 53-54 (Lawrence S. Wrightsman et al. eds., 1987).


n10. For an extensive first-hand account of the jury selection in this trial, see Jay Schulman et al., Recipe for a Jury, Psychol. Today, May 1973, at 37-44, 77-84.

n11. See Kassin & Wrightsman, supra note 1, at 57.


n15. See infra Tables 1 and 2.


n17. Roy J. Konray, Cyberjury (visited Nov. 15, 1997) <http://www.cyberjury.com>. According to this site: Cyberjury panels decide real cases. Cyberjury decisions are then used by the attorneys in the case to decide whether they should drop the case, try the case, or settle the case (and if so, for how much). In some instances, all of the parties in a case have agreed to be bound by the decision of Cyberjury.

Id.

n19. See id.


n21. Seventy-five surveys were returned by the United States Post Office without a forwarding address. One hundred and seven consultants responded, resulting in a 35% response rate. The survey was mailed on March 3, 1998 and the cutoff date for responses was April 1, 1998. Respondents were not offered compensation in return for participation. All the respondents practice trial consulting in the United States. See the Appendix for the survey questionnaire instrument.

n22. The trial consulting services described here are grouped by category: pretrial research, jury selection, and courtroom presentation/strategy services. See discussion infra Part II.B.3.

n23. Newer incarnations arise along with changes in the Zeitgeist of psycholegal theory and technology.

n24. Consider the observation of a survey respondent:

There are hundreds, if not thousands, of people claiming to be trial consultants. The vast majority are simply bored clinical psychologists, frustrated lawyers, or actors looking to make money by selling communication skill training. The value that this latter group of "consultants" provides is minimal (and may even be detrimental).

n25. 36.4% of respondents to our survey were sole practitioners, whereas 49.5% worked as part of a team (14.0% of respondents did not indicate their work status). In our sample, there was no significant difference between the number of sole practitioners and the number of non-sole practitioners, $X^2(1) = .82$, ns.

n26. Sole practitioners were not significantly older than consultants who worked as part of a team, $t(78) = -.72$, ns, nor did they have significantly more years of experience as consultants, $t(90) = -.73$, ns.

n27. The reported typical hourly fees for respondents ranged from $50 to $375 dollars. The mean typical hourly fee was $178.04, $s = 57$. Sole practitioners reported an hourly fee rate that did not differ significantly from that of consultants who do not work alone, $t(84) = 1.65$, ns.

n28. Female consultants did not differ from male consultants in terms of typical hourly rate, $t(79) = .19$, ns, years of experience, $t(82) = -.92$, ns, or sole as opposed to non-sole practitioner work status, $X^2(1) = .08$, ns.

n30. The oldest, and one of the most common, pretrial tools is the "community attitude survey," a survey of the community from which the jury pool and ultimate jury are to be drawn. Generally, 200 to 300 individuals are drawn randomly from the telephone book, read a case summary, and asked a series of open- and closed-ended questions regarding the issues in the pending litigation. See Bennett & Hirschhorn, supra note 16, at 77. The objective is to obtain derivative demographic and attitudinal profiles of the community members most likely to be represented on a jury panel. Because the ultimate goal is to obtain the perspectives of potential jurors, the sample usually is restricted to persons eligible for jury duty.

The resultant analysis may do more than provide a profile of the "ideal juror." Although there exists no completely impartial juror in the tabula rasa sense, attitude surveys may demonstrate so much prejudice against a party as to make obtaining an impartial jury problematic. In that event, the survey results will support pretrial motions to request a change of venue or venire (i.e., a redrawn panel), to expand the scope of voir dire, or to increase the number of peremptory challenges. See Gobert & Jordan, supra note 29, at 88.

n31. A tool borrowed directly from the marketing industry is the focus group. It is a group representing a cross-section of the community having demographic characteristics similar to the projected or actual jurors assembled to test specific parts of the attorney's case. For example, the group's reactions to opening or closing arguments, a particular witness, a demonstrative aid or the theory of the case are commonly gauged. After the group deliberates (often viewed by the trial team via closed circuit TV) and gives their joint reaction, further insight may be gained by interviewing individual members in detail about the factors which weighed in their decision, and about what they did and did not like or understand. This information, when identified with particular personalities and demographic types, may greatly facilitate jury selection and decisions as to the best approach for presenting evidence at trial. The focus group can easily be expanded to a full-blown mock trial.

n32. Just as new products are tested on the local level before their introduction on a national scale, so can a case be tested by a mock trial. Mock jurors are selected, observed and later interviewed in the same way as are focus group members. The difference is that a mock trial can be a full dress rehearsal, including voir dire of the panel, opening arguments, witness testimony for each side, closing arguments, judge's instructions, and jury deliberations. The entire panoply of variables that can emerge during the trial may thereby be exposed. However valuable mock trials may be in shaping jury selection and trial strategy, they tend to be commensurately time-consuming and expensive.


consultants hold such immodest views. One survey respondent writes:

Too often consultants refer to a 'win-loss' record which is unethical at the very least and arrogant as well. To assume as a trial consultant we are responsible for any case being won or lost disregards evidence, facts, verdict forms and jury instructions, the attorneys, their clients and court and is absurd!


n36. Once the panel from which the jury will be drawn is determined, trial consultants can conduct investigations of the prospective jurors and produce information for use by the attorney during jury selection. These investigations take two forms: developing community network models and surveillance of prospective jurors' homes. Community network modeling first derives information from other survey methodology, such as demographic analysis and interview responses from community surveys. Investigators then try to contact people in the community who are co-workers or neighbors of the prospective juror, or are affiliated with the same school, church, or clubs. Surveillance involves drive-by observations and photos of the prospective jurors' home. It also entails checking public records such as voter registration, court proceedings, and property holdings; this may provide valuable information about each individual's political views and finances. A caveat is that investigations of actual and prospective jurors can raise serious issues of privacy invasion and attempting to influence juries.

n37. Two integral predicates of the justification for hiring trial consultants are: first, that they can design voir dire questions that markedly enhance the useful information that is obtainable; and second, that they can make choices on final jury composition far superior to that of attorneys acting without the benefit of jury science and the special abilities of trial consultants. The consultant's jury selection advice comes to fruition (or not) in the exercise of the attorney's peremptory challenges.

One increasingly popular means of gathering information on prospective jurors prior to formal in-court voir dire questioning is through questionnaires. Many people are more candid in response to such questions than to those posed in open court. See Bennett & Hirschhorn, supra note 16, at 107. Courts regularly require prospective jurors to fill out questionnaires, but these contain very general questions. Trial consultants therefore advise attorneys to ask supplemental case-specific and juror self-image questions. The answers can be programmed into the computer by category. Computer programs also permit comparison of questionnaire responses to case-specific questions with those received in community surveys. This analysis helps predict reactions to the planned case theory presentation, and provides the trial consultant with important information on the panelist's veracity and other issues critical to the decision of whether to strike that juror in close calls. Bennett and Hirschhorn predict that as optical scanners become more sophisticated, they will supply trial consultants with valuable analyses of handwritten responses on the questionnaire. See id. at 119.

n38. A substantial body of research addresses various aspects of studies used to support motions for a change of venue, such as a report on the biasing effect of pretrial publicity. See, e.g., Rita J. Simon, The Jury: Its Role in American Society 109 (1980); Solomon Fulero & Steven Penrod, Attorney Jury Selection Folklore: What Do They Think and How Can Psychologists Help?, 3 Forensic Reps. 233 (1990); Geoffrey P. Kramer et al., Pretrial Publicity, Judicial Remedies, and Jury Bias, 14 Law & Hum. Behav. 409 (1990); Gary Moran &


n41. Consultants reported spending a significantly greater percentage of their time on pretrial research than on courtroom strategy/presentation services t(67)= -2.53, p<.05. The difference in percentage of time spent on jury selection as opposed to courtroom strategy/presentation services was not significant, t(62)= -.53, ns. The difference in percentage of time spent on pretrial research and jury selection also was not significant, t(63)= 1.96, ns.


n43. See Galen, supra note 34.

n44. To make a possibly edifying distinction, many studies assess the impact of various jury trial strategies that come to bear after jury selection, specifically during evidence presentation and thereafter. Illustrative studies would include the effect of using expert or child witness testimony. In practice, trial consultants often make such proposals and promote related strategies. However, the inquiry here is directed towards and confined to studies of trial consulting efficacy, not to particular strategies that may have been suggested by consultants.


n48. See Fulero & Penrod, supra note 38, at 251-52.


n50. Diamond, supra note 47, at 180.


n55. Cutler, supra note 46, at 229.


n57. Gary Moran et al., Attitudes Toward Tort Reform, Scientific Jury Selection, and Juror Bias: Verdict

n58. See Mills & Bohannon, supra note 57, at 24.

n59. See Moran et al., supra note 57, at 324.


n61. Assuming the predictive value of the case-specific approach raises a cognate caveat: there must be the procedural opportunity and means for obtaining the requisite information from the research subjects. Specifically, if case-specific attitudes are important for identifying juror bias, there must be ample opportunity and resources for the attorney to ascertain that bias during voir dire so that peremptory challenges and challenges for cause can be wisely used. If time, resources or court rules do not permit sufficiently extensive attorney-conducted voir dire, the benefits of the case-specific approach will be unavailing. With regard to court rules, federal procedure typically disallows attorney-conducted voir dire, and judges are not obligated to submit questions to the venirepersons suggested by the attorneys. See Cutler et al., supra note 60, at 166-67. State practices vary, but most follow either the federal rule or restrict attorney-conducted voir dire. See id. "The modern trend is to restrict the participation of attorneys in voir dire and give most of the responsibility for questioning to the judge." Tanford & Tanford, supra note 53, at 767.

n62. See Diamond, supra note 47, at 182; Fulero & Penrod, supra note 38, at 254; Visher, supra note 60, at 1, 13-14; Saks, supra note 8, at 59, 61. But much of the research on jury decision-making uses case stimuli that are not "balanced" or "close" in terms of evidence, and therefore may be inadvertently masking the determinant nature of jurors' personalities on case outcome. Two problems arise when unbalanced cases are used in jury decision-making research. First, research suggests that if the strength of evidence in a case is superior to one party, cases are more predictable by the strength of evidence than by "extralegal" factors such as the personality traits and cognitive biases of jurors. See Barbara F. Reskin & Christy A. Visher, The Impacts of Evidence and Extra Legal Factors in Jurors' Decisions, 20 L. & Soc'y Rev. 423 (1986). For this reason, experiments attempting to study the nature of these extralegal variables are not likely to be useful if unbalanced cases are used. Researchers attempting to determine the role of personality, demographic or cognitive attributes in jury decision-making should pretest their stimuli to ensure that the cases they are using are balanced ones - if they do not use balanced cases, they likely will underestimate the impact of jury characteristics relative to the impact of evidence on the trial outcome. Second, insofar as jury studies may be designed to assist legal practitioners, unbalanced cases have limited utility - cases in which one party's evidence clearly is superior are usually settled before trial and are therefore never tried by jury. Cases that go to trial are often evidentially balanced. See Jeffrey R. Boyll, Psychological, Cognitive, Personality and Interpersonal Factors in Jury Verdicts, 15 L. & Soc'y Rev. 163 (1991). To boost external validity, jury studies should reflect this fact by using balanced cases for case stimuli.

n63. See Visher, supra note 60, at 13-14.
n64. See Diamond, supra note 47, at 182; Patterson, supra note 60, at 108.

n65. See Tindale & Nagao, supra note 56, at 409, 417-18, 422-23.


n68. See supra note 27 and accompanying text.

n69. See id.

n70. Stolle et al., supra note 45, at 146 (footnotes omitted).

n71. See J. Stratton Shartel, Litigators Describe Key Factors in Use of Jury Consultants, Inside Litig., Aug. 1994, at 1. We can speculate as to whether the broadening of trial consulting services - as opposed to the mere increase in the use of trial consultants - has independent potential significance. Simply hiring a trial consultant may be motivated by a desire to avoid a malpractice claim by a disconsolate client (should the case go badly), just as some physicians order extraneous diagnostic tests to avoid malpractice charges. Alternatively, the employment of a trial consultant may be used as a psychological ploy to intimidate the opposition. In either scenario, the pressure to hire a trial consultant increases when the opposition has done so. On the other hand, utilizing a broader array of trial consulting services bespeaks the client's or attorney's assignment of value to them.

n72. Clarence Darrow, Attorney for the Defense, Esquire, May 1936, at 3, 211.

n73. See Roberts, supra note 29, at 161.


n75. Saks, supra note 8, at 61.

n76. Fulero & Penrod, supra note 38, at 252.


n81. See Kalven & Zeisel, supra note 77, at 424-26.

n82. See questionnaire instrument, Appendix.

n83. For pretrial research, mean relative frequencies were positively correlated with efficacy (r(97) = .25, p<.05), but not with mean percentage of time (r(68) = .19, ns). For jury selection, mean relative frequencies were positively correlated with efficacy, (r(90) = .44, p<.001), as well as with percentage of time spent working (r(62) = .26, p<.05). For courtroom presentation and strategy, mean relative frequencies were positively correlated with efficacy (r(91) = .57, p<.001), as well as with percentage of time spent working (r(71) = .30, p<.05).

n84. Future studies might explore reasons why certain services are offered to clients: do consultants who offer a variety of services usually provide a specific service to a given client because that client requested that specific service, or do consultants tend to provide services according to their own determinations of what a client needs? Or, are both scenarios equally likely?


188. "Some races and-or ethnic groups tend to be more violent than others." Strongly agree? Agree? Disagree? Strongly disagree? No opinion? If you wish to do so, please explain your answer."

Id. at 383 n.246.

With regard to gender: "164. Have you or someone you know had any contact with a family violence program, a battered women's shelter, or attended any programs concerning family or domestic violence? Yes?
No? If yes, who was involved? Please explain the circumstances." Id.


n89. Jeffrey Abramson writes, "scientific jury selection grew out of, and in turn pushed further, the prevailing skepticism about juries as impartial institutions of justice." Abramson, supra note 86, at 176. Negative public perceptions of trial consulting do not escape the practitioners either. Jo-Ellan Dimitrius, jury consultant for the O.J. Simpson criminal defense team, conceded, "unfortunately, what we do is viewed as suspect by people - always has been, always will be." Mark Miller, The Road to Panama City, Newsweek, Oct. 30, 1995, at 84.

n90. In general, scientific jury selection evokes cynicism toward the notion of jury independence. One observer notes, "jury research assumes that stereotypes are valid and that jury deliberation is merely an exercise in small-group dynamics. It tends to recommend that a lawyer match the presentation of his case - its style, its volume, its color - to the preconceived psychological variables of a specific type of juror." Paul DiPerna, Juries on Trial: Faces of American Justice 148 (1984). On the other hand, scientific jury selection may signify progress in the judicial system. Botein and Gordon anticipated such a state of affairs:

For a long time science has been deflating our notions about the infallibility of the trial process. More recently, the technicians have gone even further. There have been developed startling, effective techniques for "eavesdropping on man's unconscious," as it has been termed. If these techniques fulfill the expectations of many sober-minded men of science, the laboratory will be equipped to reveal truth much more efficiently and inexorably than the courtroom. We may reach the point where our present methods of resolving legal disputes may seem as archaic and barbaric as trial by ordeal seems to us today; and courtroom procedures as we know them may have to be scrapped.

Because we stand at the threshold of such a possibility, it should be profitable to... consider its implications for the administration of law in this country. If science can reproduce truth more reliably and effectively than our present system, we shall not be able long to defer our rendezvous with progress.


n91. See Stolle et al., supra note 45, at 161-63, 168.

n92. Some consultants do pro bono work. See, e.g., infra note 180 and accompanying text.


n94. Hunt, supra note 20.
n95. This was a concern of the venerable U.S. Supreme Court Justice Hugo Black. In Griffin v. Illinois, 351
U.S. 12 (1956), he wrote "there can be no equal justice where the kind of trial a man gets depends on the amount
of money he has." Id. at 19.

n96. Valerie P. Hans & Neil Vidmar, supra note 7, at 93-94 (emphasis added).

n97. Saks, supra note 8, at 55 (emphasis added).

n98. See supra note 62 and accompanying text.

(1995) ("While trial consultants work in a number of areas, it is in voir dire, or jury selection, that they have
drawn by far the most attention and fire.").

n100. The Supreme Court has consistently affirmed lower court rulings reaffirming the jury's innate power
of nullification, even though the exercise of that power is a violation of the jurors' explicit oath to adhere to the
law as instructed by the judge. In Duncan v. Louisiana, 391 U.S. 145 (1968), for example, the Court recognized
as fundamental to our system the jury's power to displace unjust law or unjust application of the law by appeal to
conscience. See id. at 156. For a historical review and discussion of jury nullification, see Mortimer R. Kadish
& Sanford H. Kadish, Discretion to Disobey (1973); Charles Rembar, The Law of the Land (1980); Alan
Scheflin & Jon Van Dyke, Jury Nullification: The Contours of a Controversy, 43 Law & Contemp. Probs. 51
(1980).

n101. See Victor Gold, Covert Advocacy: Reflections on the Use of Psychological Persuasion in the

n102. This is not to imply that only incompetent or unethical practitioners boast of a high success rate.
Jo-Ellan Dimitrius, perhaps the most famous trial consultant, claims a 90% rate of success in the over 100 cases
she has handled since 1984. See Gollner, supra note 34, at A23.

n103. See James D. Herbsleb et al., When Psychologists Aid in the Voir Dire: Legal and Ethical
Considerations, in Social Psychology and Discretionary Law 197, 208 (Lawrence Edwin Abt & Irving R. Stuart
eds., 1979).

n104. See id. at 209.

n105. Id. at 210.

n106. See id. at 210-11.

n107. See id.
n108. See supra note 34 and accompanying text.


The prohibition in paragraph (b) of statements that may create "unjustified expectations" would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements. Such information may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances.

Id. at Rule 7.1 cmt.


n112. See id. at Rule 5.3(c).

n113. See Herbsleb et al., supra note 103, at 205-08.


n122. Few formal guidelines govern voir dire procedure. Thus judges vary in the degree and type of voir
dire they permit. Some judges allow extended voir dire questionnaires distributed to the panel, lengthy direct
questioning of jurors, and substantial latitude in the types of questions asked. See Gerald Moran et al., Jury
Selection in Major Controlled Substances Cases: The Need for Extended Voir Dire, 3 Forensic Reps. 331, 332
(1990). Conversely, some judges allow only minimal voir dire, and limit the attorneys to submitting questions to
the judge who will do the asking. The latter practice is common in the federal courts. See id. Most states follow
the federal practice of minimal voir dire. Cutler et al., supra note 60, at 165, 167. Some states, such as Florida,
have traditionally allowed extended voir dire. See id. Others, such as California, have moved away from it. See
id. And several others are debating it. See id.

n123. See Hastie & Pennington, supra note 87, at 975.

n124. See, e.g., Barber, supra note 120, at 1246.

n125. See Susan E. Jones, Judge- Versus Attorney-Conducted Voir Dire: An Empirical Investigation of
Juror Candor, 11 Law & Hum. Behav. 131 (1987). The conclusion was based on a comparison of juror
responses to written and oral questioning.

n126. See Franklin Strier, Reconstructing Justice: An Agenda For Trial Reform 132-35 (1996), for a fuller
discussion of the issues underlying this debate.

n127. "The decision today will not end the racial discrimination that peremptories inject into the jury
selection process. That goal can be accomplished only by eliminating peremptory challenges entirely." Batson v.
Kentucky, 476 U.S. 79, 102 (1986) (Marshall, J., concurring). See also, Cheryl G. Bader, Batson Meets the First
Amendment: Prohibiting Peremptory Challenges That Violate a Prospective Juror's Speech and Association
Rights, 24 Hofstra L. Rev. 567 (1996); Raymond J. Broderick, Why the Peremptory Challenge Should Be

Pennington, supra note 87, at 975.

n129. Stephen Adler writes:

Eliminating peremptory challenges means destroying the only means through which lawyers can... "get a jury
you like the look of." In the United States it would also mean destroying the huge market for jury consultants
who promise not only to pack juries but to do so scientifically. It would mean the end of primers, courses, and
conferences on how to assemble a winning jury. And it would mean that decades of stereotypes about how
people of various ethnic groups are likely to vote would become moot. Black and white, fat and skinny, young
and old, transit worker and physicist all would be treated alike. And rather than wonder why they were excluded
and doubt the fairness of the system, millions among the formerly spurned would finally get their due: the
chance to exercise true power in a democracy.

Adler, supra note 128, at 224.
n130. See id. at 223-24.

n131. See Bader, supra note 127, at 590-92.

n132. See Barbara Allen Babcock, A Place in the Palladium: Women's Rights and Jury Service, 61 U. Cin. L. Rev. 1139 (1993). An unfortunate strategic consequence of restricting litigators to challenges for cause would be the untenability of treating potential jurors gingerly to avoid alienating them with the very aggressive questions necessary to establish the grounds for a cause challenge. See id. at 1175-76.

n133. See Barber, supra note 120, at 1245; Hastie, supra note 47, at 726; Herbsleb et al., supra note 103, at 203-04.


n136. Cf. Herbsleb et al., supra note 103, at 204-05 (arguing that American Bar Association Standards make the doctrine applicable only to attorney opinions, not facts; and, further, that social science data such as survey results fall outside the scope of this doctrine and should be discoverable).


n138. See, e.g., But a Trial Consultant May Bring a Fresh Approach, Nat'l L.J., June 6, 1994, at C2. Trial consultant Robert Hirschhorn responded to the question, "Are you stacking the deck by bringing in jury consultants?" in an interview with the National Law Journal: "Absolutely not. In all the cases we've handled, we're 10 yards behind ... We just want to bring the client up to an equal point on the starting line." Id.

n139. See Hans & Vidmar, supra note 96, at 93-94.


n142. See Fed. R. Evid. 706.


n145. See Thomas E. Willging, Court Appointed Experts 1-23 (1986).

n146. See Bandy v. United States, 296 F.2d 882 (8th Cir. 1961).

n147. See United States v. Durant, 545 F.2d 823 (2d Cir. 1976).

n148. See Williams v. Martin, 618 F.2d 1021 (4th Cir. 1980).


n150. See Mason v. Arizona, 504 F.2d 1345 (9th Cir. 1974).

n151. Some attorneys have apparently succeeded in convincing courts of the need for experts to assist in community analysis and jury selection. Relevant cases, mostly unreported, are collected in the National Jury Project, Jurywork A-5 to A-18 (2d ed. 1997). But the cases in which expert assistance has been ordered have been limited almost exclusively to those involving the needs of indigent criminal defendants. See discussion infra Part VI.J. (Appointment of Trial Consultants for Indigents).

n152. See Barber, supra note 120, at 1247.

n153. See id.

n154. See Gold, supra note 88, at 511.

n155. See id.

n156. See Adler, supra note 4, at 1.

n157. Jurors identities have been withheld in the United States under exceptional circumstances. In United States v. Barnes, 604 F.2d 121 (2d Cir. 1979), the trial judge sua sponte ordered juror names and addresses withheld out of concern for juror safety and privacy in a narcotics case. The appellate court upheld the trial judge's order, but stressed safety rather than the more nebulous privacy concern. Few cases have presented the constellation of circumstances found in Barnes.

n158. See Weinstein, supra note 116, at 49.

n159. See Gordon, supra note 12, at 34.


n162. See id.


n166. See Gordon, supra note 12, at 35.

n167. Presumably the same office could also resolve fee disputes.

n168. The total expected productivity is a function of several variables, including the number of states requiring licensing, the number and type of schools that install "law and psychology" or trial consulting programs, whether the program is offered in pursuance of a concentration, minor, or major, and, in general, the cast that trial consultant training assumes in academia; that is, a different type, quantity, and level of scholarship are presumed to result from applied rather than theoretical fields.

n169. See discussion supra Part IV.B. (Only Affordable by the Wealthy).

n170. See supra notes 8-9 and accompanying text.

n171. A related sanction would be to hold the licensee's clients - almost always attorneys - vicariously liable for the tortious or criminal behavior of the consultant. This is theoretically possible now under general agency law, but could be buttressed by statute.


n173. Gordon, supra note 12, at 34-35.

n174. *American Soc'y of Trial Consultants, supra note 172,* III.

n175. Id. IV. Given the absence of any professional standards in trial consulting per se other than those in the ASTC's Code, the last clause is a marvel of tautology.
n176. Id. VII.

n177. See id. V. This constraint seems to be freely ignored. See supra note 102 and accompanying text.

n178. See American Soc'y of Trial Consultants, supra note 172, V.

n179. See id. VI.

n180. See id. VIII.

n181. Consultants indicated their attitudes regarding ideas of regulation and ethics on a scale from 1 = "strongly agree" to 7 = "strongly disagree." The midpoint, 4, indicated "uncertain." The mean response to the question of whether trial consultants should be licensed by the state was 4.8, s = 2.23, indicating an overall slight disagreement. The mean response to the question of whether the ASTC Code of Professional Standards establishes an adequate level of professional conduct and client protection was 3.76, s = 1.90, indicating an overall slight agreement. The mean response to the idea that if the trial consulting profession does not increase its self-regulation, the government will step in and regulate it was 4.66, s = 1.90, indicating an overall uncertainty. Overall, the mean "slight" and "uncertain" responses to these questions suggest that trial consultants did not have strong convictions about professional standards and ethics on the issues we raised.

n182. See id.

n183. See id.


(e) Services Other Than Counsel. -

(1) Upon Request. - Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.

Id. (emphasis added).

n190. See 5 John Henry Wigmore, Evidence in Trials at Common Law 1367 (rev. ed. 1974). Wigmore was referring specifically to cross-examination, often considered the essential mechanism of the adversary system's search for truth.
